

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

The HipSaver Company, Inc.,

Plaintiff,

v

J.T. Posey Company,

Defendant

Civil Action No. 05-10917 PBS

**PLAINTIFF'S STATEMENT CONCERNING THE DEFENDANT'S REVISED  
"LABORATORY TEST" ADVERTISING**

At the July 12, 2005 hearing on the Defendant, J.T. Posey Company's Motions to Transfer and Dismiss, counsel for Posey informed the trial court that a revised "Garwood Laboratories" advertisement has been published. The trial court asked the HipSaver Company to review the revised advertisement and to provide a statement of agreement with or objection to the revised advertisement. Following the hearing, counsel produced the revised advertisement, copy enclosed at Tab A.

The HipSaver Company objects to the revised advertisement as literally false and as simply the latest iteration in a chronic campaign of false and deceptive advertising. The HipSaver Company's Complaint stands against both the first of the Garwood Laboratories advertisements and against the revised advertisement.

The revised advertisement no longer suggests that Posey's HIPSTER contains the "most effective impact absorbing material" for preventing hip injury and no longer proclaims that the Garwood Laboratories test is as an "independent study". Nevertheless, the revised advertising continues the underlying theme of misrepresentation of the test, its purpose, the materials tested, and the results. The revised advertisement is little more than a restatement of the literally false claims of the first advertisement, all of which violate the Lanham Act, 15 U.S.C. §§1125, 1117; G.L. c.93A, §§2, 11; and the provisions of the earlier Settlement Agreement.

Specifically, the revised advertising is objectionable, false, and deceptive in at least the following respects:

1. The revised advertising presents the Garwood Laboratories testing as if some minimally credible, legitimate, and empirically valid testing of Hipster products was conducted. This is an outright deception. Garwood Laboratories set up the testing equipment but disclaimed everything else associated with testing. Indeed, Garwood Laboratories did not verify identity of the products tested, did not maintain independent custody of products tested, did not assess the results, and made no findings with respect to the recorded results. This was not a legitimate laboratory test by any measure. The laboratory was simply a backdrop, much as UCLA was for Posey's tests in 2004, for a deceptive and literally false advertising campaign crafted by Posey.

2. The revised advertising states that Posey has retained “Garwood Laboratories to conduct testing to select a comfortable and effective impact absorbing material.” Posey’s statement is false. Garwood Laboratories has not conducted testing for any such purpose and had no role in selecting a “comfortable and effective impact absorbing material”. The reference to Garwood is a deception intended solely to create the appearance of a credible test protocol and empirically valid tests where none exists.
3. The revised advertising clearly states and suggests that “Garwood Laboratories” conducted testing to “select a comfortable and effective impact absorbing material”. The advertisement then proclaims that this testing has confirmed that the “low profile Hipster” is an “excellent” impact absorbing material. This is literally false. Posey has withheld and misrepresented the material fact that it alone, not Garwood Laboratories, declared that the testing demonstrates the alleged excellence of the Hipster products. Garwood Laboratories expressly disclaimed any such purpose in the testing and any such conclusion from the testing.
4. The revised advertising appears under the banners, “Posey Hipsters Help Protect Against Injury from Falls” and “Posey Hipsters Proven Effective In laboratory Test”. As noted, the advertisement then presents the Garwood Laboratories test as one which demonstrates the effectiveness of the Posey Hipster to protect against hip injury and validates the Hipster product. This is literally false. The

test is not an empirically valid measure of effectiveness against hip injury and has not been presented by Garwood Laboratories as such.

5. The revised advertisement claims that “a test was created that would simulate a fall causing direct impact to the greater trochanter” [the hip joint]. This is literally false. The test is nothing more than a rudimentary, mechanical impact test. It is not a biomechanical test and has no empirically valid capacity to assess a “fall” or to demonstrate effectiveness against hip injury in humans.
6. The revised advertisement refers directly to “high durability” Hipsters, represents this product as if it has been tested in the Garwood Laboratories test, and then presents this product as having “excellent” impact absorption and demonstrated effectiveness against hip injury. This is false and a deceptive misrepresentation of what was tested.
7. The revised advertisement misrepresents the Hipster products as “washable to CDC standards for soiled linen”. This is literally false. The CDC washable temperature standard is 160°F for 25 minutes. In fact, in the same advertisement Posey displays a wash label for most of its Hipster products with a wash temperature limit of only 120°F. Clearly, this fails the CDC standard, yet Posey maintains this outright misrepresentation of its failure to meet a significant safety standard. This is exacerbated by Posey’s failure to notify nursing and rehabilitation facility purchasers and patients that its products do not meet the CDC standard.



8. The revised advertisement continues to note that test data is on file with Posey.

From information provided by Posey, the HipSaver Company understands that the data includes alleged test results for HipSaver products. These test results are literally false, and Posey's specific references to and comparisons with HipSaver products irreparably harm the HipSaver Company.

The Garwood Laboratories advertising and the revised Garwood Laboratories advertising challenged in this lawsuit must be understood in the context of Posey's longstanding campaign of false advertising, including the "UCLA" advertising carried on in 2003 and 2004 which was contested last year in this court. Posey's false advertising is directed at its only real competitor in the soft hip protection garment marketplace, the HipSaver Company.

And while the target is the HipSaver Company, the method is to achieve "believability" through persistent claims put before a purchasing audience that is relatively unsophisticated and cannot readily distinguish a false claim or junk science. Nevertheless, the long term repetition of these false claims clothed in "laboratory testing" or an "independent laboratory study" or a "UCLA study" for that matter is deception as a matter of law. *See, for example, Schick manufacturing Inc. v The Gillette Company*, 372 F. Supp.2d 273 (D. Conn. 2005) And that deception violates the Lanham Act and c.93A.

The immediate consequence of this deception to HipSaver, a small focused product company, is, of course, the lost opportunity for sales. More important, there is the risk that Posey's campaign of chronically false advertising will continue to mislead

health care facility purchasers to believe that Posey's product has been proven to be effective against injury to humans and that it maintains a durable level of effectiveness after use and washing. Hip protection garments are not a casual consumer product where false and deceptive advertising is of no particular consequence. Here, the consequence is injury to often frail patients.

Finally, there is the risk that the consequences of Posey's false advertising of inferior products will retard, shrink, or even destroy the marketplace for soft hip protection garments. At some point, purchasers will recognize that Posey's claims for effectiveness and durability are indeed false. Yet, the HipSaver Company does not have the marketing and advertising resources to counter with a demonstration that its products are durable and effective. In the face of Posey's persistently false claims, purchasers may simply assume that no soft hip protector is durable or effective and turn to other products and strategies to safeguard patients from hip injury. That result will be devastating to the HipSaver Company but is of no particular consequence to Posey which can use its monopoly vendor status to turn to 600 other products it peddles to nursing and rehabilitation facilities.

### **CONCLUSION**

In the fall of 2004, the HipSaver Company halted Posey's "UCLA" advertising campaign which made much the same false claims at issue now. In the fall of 2004, Posey retracted its "UCLA" advertising, issued a public statement of regret, and

committed itself to accurate data and fair advertising. Within four months of the 2004 settlement, however, Posey returned with its false claims of Laboratory Testing at Garwood Laboratories, complete with a bar chart display similar to that used in the "UCLA" campaign, an "independent Laboratory study" reminiscent of its "laboratory testing at UCLA" claims from last year, and alleged comparative data for HipSaver products. This new campaign, including the revised advertising released last week, is no less objectionable, false, damaging, or unlawful.

Respectfully submitted,

THE HIPSAVER COMPANY, INC.

By its Attorneys,

/s/ Edward J. Dailey

Lee Carl Bromberg

BBO no. 058480

Edward J. Dailey

BBO no. 112220

Peter J. Karol

BBO no. 660338

BROMBERG SUNSTEIN, LLP

125 Summer Street - 11th floor

Boston, Massachusetts 02110-1618

617.443.9292

617.443.0004 (fax)

Dated: July 19, 2005

#### CERTIFICATE OF SERVICE

I certify that a copy of this document has been forwarded by electronic filing and USPS First Class mail today to Defendant's counsel of record, Anthony J. Fitzpatrick, Esq., DUANE MORRIS LLP, 470 Atlantic Avenue, Boston, Massachusetts 02210 and by USPS First Class mail to Jeffrey G. Sheldon, Esq., SHELTON & MAK, 225 South Lake Avenue, 9<sup>th</sup> Floor, Pasadena, California 91101

Dated: 7.19.05

/s/ Edward J. Dailey

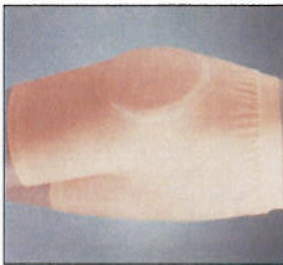
Edward J. Dailey

02820/00502 418989.1

TAB A



# POSEY HIPSTERS HELP PROTECT AGAINST INJURY FROM FALLS



It's a long way down for residents at risk of injury from falls. You can greatly reduce that risk with Posey Hipsters. The Hipsters' high energy-absorbing foam pads are positioned precisely over the hip bones, increasing the odds of surviving a fall uninjured. The Hipsters are comfortable and slim enough to be virtually undetectable under clothing. By offering increased protection, Hipsters relieve residents' anxiety about falling and enhance their quality of life.

- ▶ High impact-absorbing viscoelastic pads protect hip bones against injury from falls
- ▶ Soft, comfortable pads improve compliance versus hard-shelled products
- ▶ Washable to CDC standards for soiled linen without removing the pads
- ▶ 100% latex-free
- ▶ Five sizes for correct fit
- ▶ Discreet, low-profile pads are virtually undetectable under clothing

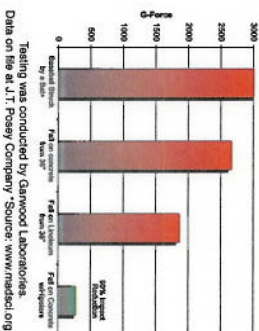


*Low Profile - All styles fit discreetly under men's and women's clothing.*



## Posey Hipsters Proven Effective in Laboratory Test

Posey engaged Garwood Laboratories to conduct testing to select a comfortable and effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,600G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.



**Special offer: 30-day no-risk free trial.**  
Test the Posey Hipsters for yourself with no obligation to buy.



### POSEY #6016 HIPSTERS STANDARD BRIEF

- ▶ Easily fits over undergarments, or can be worn as underwear.
- ▶ Unisex sizing.
- ▶ #6016H Standard Brief with high durability pads.

### POSEY #6017 INCONTINENT BRIEF

- ▶ Snap front for easier application over diaper. Unisex sizing.
- ▶ #6017H Incontinent Brief with high durability pads.

### POSEY #6018 MALE FLY BRIEF

- ▶ Easily fits over undergarments, or can be worn as underwear.
- ▶ Fly front for improved compliance in male residents.
- ▶ #6018H Male Fly Brief with high durability pads.

### POSEY #6019 EZ-ON BRIEF

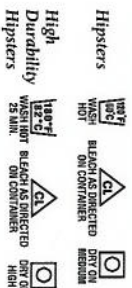
- ▶ Residents can wear their own undergarments.
- ▶ Can be worn in the shower.
- ▶ Hip pads can be removed for laundering or replacement.
- ▶ #6019H EZ-ON Brief with high durability pad.

#### SIZING CHART

Size	Waist Measurement	Hip Measurement
S	28" - 30" or 71 - 76cm	35" - 37" or 88 - 93cm
M	30" - 34" or 76 - 86cm	37" - 41" or 93 - 104cm
L	34" - 38" or 86 - 96cm	41" - 45" or 104 - 114cm
XL	38" - 42" or 96 - 106cm	45" - 49" or 114 - 124cm
XXL	42" - 46" or 106 - 116cm	49" - 53" or 124 - 134cm

Posey High Durability Hipsters contain denser foam than the standard Hipsters. This increased density aids in its ability to withstand higher hot washing and drying cycles.

#### LAUNDERING INSTRUCTIONS:



J.T. Posey Company  
Arcadia, CA 91006 USA  
Tel: 800-447-6739  
www.posey.com